

HEALTH AND SOCIAL CARE (NATIONAL DATA GUARDIAN) BILL

Memorandum from the Department of Health and Social Care to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Health and Social Care (National Data Guardian) Bill (“the Bill”). The Bill was brought from the House of Commons on 9 July 2018. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

2. The purpose of the Bill is to establish a National Data Guardian for Health and Social Care, and to promote the provision of advice and guidance about the processing of health and adult social care data in England. The role of the National Data Guardian for Health and Care exists already informally, and the Bill will define the role and put it on a statutory footing. The Bill contains five clauses and has one Schedule. The Bill provides for the establishment of a statutory office holder to be known as the National Data Guardian for Health and Social Care. The National Data Guardian may provide both informal advice, assistance and information about the processing of health and adult social care data in England, and formal guidance about the processing of health and adult social care data in England. The Bill imposes a statutory duty on public bodies within the health and adult social care sector in England (and private organisations who contract with them to deliver health services or adult social care) to have regard to the National Data Guardian’s formal guidance. The National Data Guardian’s formal guidance would be subject to consultation and will be published. The Bill also makes provision about the administrative and financial operation of the National Data Guardian’s office.

C. DELEGATED POWERS

3. The Bill contains two clauses which make provision for delegated powers.

4. The first – clause 1 (National Data Guardian for Health and Social Care) – gives the National Data Guardian power to issue formal guidance about the processing of health and adult social care data in England. The Bill also imposes a duty on public authorities within the health and adult social care sector in England (and private organisations who contract with such public authorities to deliver health services or adult social care) to have regard to this guidance.

5. The second – clause 5 (Commencement) – gives the Secretary of State the power to provide for the commencement of the provisions of the Bill.

6. In deciding whether matters should be specified on the face of the Bill or dealt with in delegated legislation, the Department of Health and Social Care has carefully considered the need:

- to avoid too much technical and administrative detail on the face of the Bill; and
- to provide flexibility for responding to changing circumstances, so that requirements can be adjusted without the need for further primary legislation.

7. In deciding what procedure is appropriate for the exercise of the powers in the Bill, the Department has carefully considered in particular:

- whether the provisions amend primary legislation;
- the importance of the matter to be addressed; and
- the procedure for existing, related powers.

Clause 1(2) (National Data Guardian for Health and Social Care)

Power conferred on: National Data Guardian

Power exercised by: guidance

Parliamentary Procedure: none

Context and Purpose

8. This clause makes provision for the National Data Guardian to issue formal guidance about the processing of health and adult social care data in England. In combination with the duty imposed by clause 1 public bodies within the health and adult social care sector in England (and private organisations who contract with them to deliver health services or adult social care) must have regard to this guidance. The National Data Guardian is required to consult before issuing guidance and clause 1 provides that the guidance is to be published.

Justification for taking the power

9. The guidance about the processing of health and adult social care information will often be technical and will require a level of detail that the Department considers would not be appropriate for primary legislation, for example setting out data security standards or guidance on how to anonymise information effectively. In addition, the department considers that using guidance is an appropriate as the policy is that the health and social care bodies listed in clause 1(3) must simply *have regard to* the information about processing data contained in the guidance (by contrast, the policy is not to impose mandatory legal requirements, in which case secondary legislation might be more appropriate). In particular, there will need to be a degree of flexibility to enable the guidance to be revised and updated over time, for example, to reflect developments in information technology and evolving practice in the health and care sector.

Justification for the procedure

10. The Department notes the Government policy that guidance should not be used to circumvent the usual way of regulating a matter. If the policy is to create rules that must be followed, the Government accepts that this should be achieved using regulations subject to parliamentary scrutiny and not guidance. The purpose of guidance is to aid policy implementation by supplementing legal rules. There is a vast range of statutory guidance issued each year and it is important that guidance can be updated rapidly to keep pace with events. In certain exceptional circumstances it may be appropriate for guidance to be laid before Parliament or subject to the negative procedure. In this case the Department considers that it is appropriate for the guidance to not be subject to any procedure as the Bill imposes constraints on the issue and detail of the formal guidance, which will already have been considered by parliament during the passage of the Bill.

11. The Bill follows the approach of section 250 of the Health and Social Care Act 2012, under which there is no parliamentary procedure in relation to information standards (documents containing standards in relation to the processing of information) issued by the Secretary of State or the National Health Service Commissioning Board. The Department considers this is appropriate for the guidance-making power in this Bill too. This will also help to ensure consistency with the 2012 Act.

12. In addition, as noted above, the Bill imposes a number of constraints on the issue of the guidance. First, the formal guidance is to be issued not by a Minister but by the National Data Guardian, an independent office-holder. The functions of the National Data Guardian are established solely through provisions on the face of the Bill, and not through arrangements to be made by the Secretary of State. Parliament is therefore being asked to agree the National Data Guardian's functions, which set the context for the guidance to be issued under clause 1.

14. Secondly, just as for information standards issued by the Health and Social Care Information Centre under section 250 of the Health and Social Care Act 2012, the Bill requires that the National Data Guardian must consult before issuing formal guidance. Thirdly, the Data Guardian will publish any formal guidance they issue. Fourthly, the Bill does not make any provision for enforcement or penalty in the event that a body does not have regard to it. Finally, it is anticipated that the National Data Guardian's formal guidance will often address subject matter of a practical nature, for example, guidance on data security standards.

Clause 5 (Commencement)

Power conferred on: Secretary of State

Power exercised by: regulations

Parliamentary Procedure: none

Context and Purpose

15. This clause deals with the commencement of the provisions of the Bill. Clause 4(1) provides that the provisions in the Bill come into force on such day as the Secretary of State may by regulations appoint.

Justification for taking the power

16. Delegating the power provides flexibility to ensure that the provisions in the Bill come into force at suitable dates, which cannot yet be predicted, but which will ensure a period of time for preparation for all bodies affected, including the National Data Guardian.

Justification for the procedure

17. As is usual with commencement powers, regulations made under this clause are not subject to any parliamentary procedure. The detail of the provision to be commenced will already have been considered by Parliament during the passage of the Bill; commencement by regulations enables the provisions to be brought into force at the appropriate time.

**Department of Health and Social Care
06 July 2018**